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STATE OF MONTANA

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STATE OF MONTANA

Mary Kay Malloy
Defendant Pro Se
527 Furlough Road
Conrad, Mt. 59425

IN THE SUPREME COURT OF THE STATE OF MONTANA
PR-06-0120

MARVIN and KATHY KAPTEIN,

Plaintiffs,

v.

MARY KAY MALLOY,

Defendant
Pro Se

**MOTION FOR
RECONSIDERATION**

COMES NOW the Defendant MARY KAY MALLOY, and respectfully requests the Courts reconsideration of its **ORDER** filed 21 November, 2007 wherein the Court **DENIED** the Defendants "Affidavit for Disqualification of Judge for Cause".

Wherein this Court stated in its **Order**, **IT IS THEREFORE ORDERED: 1. THE MOTION TO DISQUALIFY THE DISTRICT JUDGE IN PONDERA COUNTY, CAUSE NUMBER DC-06-58 IS DENIED.**

The Court cited "The **Affidavit** does not **allege facts** showing personal bias or prejudice against the complaining party as required by § 3-1-805, MCA."

The Defendant maintains that this Court has issued its **Order** in regards to this matter under **MISTAKE OF LAW**.

3-1-805 MCA. Disqualification for Cause, the code which the Defendant cited and submitted her **AFFIDAVIT OF DISQUALIFICATION OF JUDGE FOR CAUSE** under, states "This section is limited in its application to Judges presiding in District Court, Justice of the Peace Courts, Municipal Courts, Small Claims Courts, and City Courts.

1. Whenever a party to any proceeding in any Court shall file an **affidavit alleging facts** showing personal bias or prejudice of the presiding Judge, such Judge shall proceed no further in the cause. If the **affidavit** is filed against a District Judge, the matter shall be referred to The Montana Supreme Court. If the **affidavit** is in compliance with sub-sections (a), (b), and (c) below, the Chief Justice shall assign a District Judge to hear the matter. If the **affidavit** is filed against a Judge of a Municipal Court, Justice Court, or City Court, any District Judge presiding in the District of the Court involved may appoint either a Justice of the Peace, a Municipal Judge or a City Judge, to hear any such proceedings.

(a) the **affidavit** for disqualification must be filed more than thirty (30) days before the date set for hearing or trial.

(b) the **affidavit** shall be accompanied by a Certificate of Counsel of Record that the **affidavit** has been made in good faith. An **affidavit** will be deemed not to have been made in good faith if it is based solely on rulings in the case which can be addressed in an appeal from the final judgment.

(c) any **affidavit** which is not in proper form and which does not **allege facts**

showing personal bias or prejudice may be set aside as void.

(d) the Judge appointed to preside at a disqualification proceeding may assess attorney fees, costs and damages against any party or his attorney who files such disqualification without reasonable cause and thereby hinders, delays or takes unconscionable advantage of any other party, or the court." (emphasis added)

In examining this Court's **Order** it should be noted that the Defendant submitted an **affidavit** to put into place the necessary procedures as provided for in 3-1-805 MCA, at no time did the Defendant submit a (**Motion to Disqualify the District Judge**) as cited in this Courts **Order**. Additionally this Court states "the **affidavit** does not **allege facts** showing personal bias, or prejudice against the complaining party as required by §3-1-805, MCA".

Least we defined **allege**; see Black's Law Dictionary, Third Edition ***Allegation, n.*** 1. the act of declaring something to be true. 2. something declared or asserted as a matter of fact, esp. in a legal pleading; a parties formal statement of a factual matter as being true or provable, without its having yet been proven. -----
allege, vb.

The Defendant in her **affidavit** clearly establishes the requirement of 3-1-805(c) MCA when applied to the definition of (Black's). Defendants **affidavit** page two (2), number three (3) clearly establishes the requirement of (**allege**). All other conditions of 3-1-805(a)(b) MCA have been fulfilled within the Defendants affidavit as submitted on the 9th day of November 2007.

In the Defendants **affidavit** page two (2), number four (4) the Defendant provides **facts**, again referring to Black's Law Dictionary, Third Edition, definition **fact.** 1. something that actually exists; an aspect of reality. 2. an actual or **alleged** event or circumstance, as distinguished from its legal effect, consequence, or interpretation.

3. an evil deed; a crime. *also see evidentiary fact 1* . a fact that is necessary for or leads to the determination of an ultimate **fact**. 2. a **fact** that furnishes evidence of the existence of some other **fact**. 3. See *fact in evidence*.

As established by Montana Codes Annotated a Motion, **Affidavit**, or other pleadings to the Court are considered truthful until shown otherwise.

Therefore, Malloy's **affidavit** must be accepted as truthful in that "she firmly believes that she cannot receive a fair, and unbiased, unprejudicial decision from Judge Phillips". Malloy has surely established as a minimum prima facie evidence that Judge Phillips is exhibiting a virulent bias and hostility towards the Defendants' Agent, Attorney-in-Fact, by virtue of a granted Power of Attorney in accordance with the Laws of the State of Montana. This stemming from an extra judicial episode involving the filing of a complaint by Judge Phillips against Mr. York, Defendants' Agent, Attorney-in-Fact, Power of Attorney with the Commission on Unauthorized Practice of the Supreme Court of the State of Montana. Which now manifests in Judge Phillips a deep seated antagonism toward the Defendants' Agent, Attorney-in-Fact, Power of Attorney. See *Lileky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed. 2d 474 (1994).

The revelation of Judge Phillips complaint accusing the Defendants' appointed Power of Attorney of violating § 37-61-201, MCA, without the benefit of substantial evidence is reckless on Judge Phillips behalf and establishes a bias and prejudicial relationship toward Malloy.

If Judge Phillips will not accept, recognize or otherwise allow Malloy to have her Agent, Attorney-in-Fact, Power of Attorney represent, assist or otherwise provide for the Defendant under her granted Power of Attorney then that is surely a biased and

prejudicial posture taken by Judge Phillips. Judge Phillips through his action has manifested a current hostility and antagonistic frame of mind in a matter over which he is currently presiding.

As a Power of Attorney is an extension of the person granting of such, an attack on Mr. York by Judge Phillips is also an attack on Malloy. The basis for disqualification here is premised on a extraordinary false accusation leveled against Malloy's Power of Attorney and was, and is, a personal attack that is extra judicial see *U.S. v. Serrano*, 607 F.2d 1145 (5th Cir. 1979) and *U.S. v. Zagaire*, 419 F. Supp. 494 (N. Dist. Cal 1976) it was specifically noted in taking that extra judicial attacks of a personal nature are the strongest basis for disqualification for cause.

The Defendant has established a reasonable factual basis for believing that Judge Phillips is not impartial.

When one looks to the **Canons of Judicial Ethics** adopted by the Montana Supreme Court, May 1, 1963, the Defendant would like to address this Court's attention to Canon 1. Relations of the Judiciary. Canon 2. The Public Interest. Canon 4. Avoidance of Impropriety. Canon 5. Essential Conduct.

The Defendant only offers the before mentioned Canons as a reminder as to the duty of Judges.

For the foregoing enumerated reasons, the Defendant (Malloy) respectfully requests this Court to withdraw its **Order** filed November 26, 2007 issued in proceedings (PR 06-01-02) and appoint a District Judge as provided for in §3-1-805(1.) and order a postponement of **ORDER RESETTING MOTION HEARING** as issued by Judge E. Wayne Phillips, dated the 5th day of November 2007 wherein Judge Phillips rescheduled a Motions Hearing for **December 13, 2007 at 11:00am** until such time as Defendants' Motion for Reconsideration with the

Montana Supreme Court can be ruled on.

Respectfully submitted, this 30th day of November 2007.

Mary Kay Malloy

Mary Kay Malloy
Defendant Pro Se
527 Furlough Road
Conrad, Mt. 59425

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served this date upon the following by me by delivering a copy thereof, or by me causing a copy thereof to be delivered to:

Mr. Robert Pfennings
Attorney at Law
Jardine, Stephenson, Blewett & Weaver
PO Box 2269
Great Falls, Mt. 59403-2269

Honorable E. Wayne Phillips
District Court Judge
PO Box 1124
Lewistown, Mt. 59457

by: U.S. Mail postage prepaid

DATED THIS 30th day of November 2007

Mary Kay Malloy
Defendant, Pro Se